



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

VIA E-MAIL AND FIRST CLASS MAIL

Marc E. Elias, Esq.
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November 1, 2012

RE: MUR 6552
Sherrod Brown
Friends of Sherrod Brown and Judith
Zamore in her official capacity as treasurer

Dear Mr. Elias:

On April 11, 2012, the Federal Election Commission (the "Commission") notified your clients, Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On October 25, 2012, the Commission found, on the basis of the information in the complaint, information provided by you, and other information, that there is no reason to believe that Sherrod Brown and your clients violated 2 U.S.C. § 441b(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact me at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Emily M. Meyers".

Emily M. Meyers
Attorney

Enclosure:
Factual and Legal Analysis

cc : Sherrod Brown

Avon Lake, OH 44011

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: U.S. Senator Sherrod Brown MUR 6552
Friends of Sherrod Brown and
Judith Zamore in her official capacity
as treasurer

I. INTRODUCTION

This matter was generated by a Complaint filed with the Federal Election Commission by Mark R. Brown, alleging violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), by U.S. Senator Sherrod Brown. The Complainant alleges that Brown knowingly accepted or received an impermissible corporate in-kind contribution in violation of 2 U.S.C. § 441b(a) when the Ohio State Medical Association ("OSMA") posted to the public area of its website links to a video recording of a campaign related speech that Brown had delivered to OSMA's restricted class at OSMA's Annual Meeting. Compl. ¶¶ 1, 4, 22, 28 (Apr. 9, 2012).

While 2 U.S.C. § 441b(a) prohibits OSMA from making a contribution or expenditure in connection with any federal election, in order for Brown to violate 2 U.S.C. § 441b(a) and (b), he must "knowingly . . . accept or receive any contribution prohibited by [2 U.S.C. § 441b.]" Here, because there is no evidence that OSMA did not inadvertently post to the public area of its website a video recording of Brown's speech, Brown could not have been aware that his speech would be made available to the public beyond OSMA's restricted class. Accordingly, Brown did not knowingly accept or receive an impermissible in-kind contribution from OSMA, and the Commission finds no reason to believe that U.S. Senator Sherrod Brown and Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer violated the Act.

1 **II. FACTUAL AND LEGAL ANALYSIS**

2 **A. Factual Summary**

3 Brown has served as U.S. Senator from Ohio since 2008. Friends of Sherrod Brown is
4 Brown's designated principal campaign committee, and Judith Zamore is its treasurer. OSMA is
5 a 501(c)(6) tax-exempt "membership organization" under 11 C.F.R. § 114.1(e)(1). OSMA holds
6 an Annual Meeting, which only registered members in good standing are permitted to attend.
7 Response of Friends of Sherrod Brown and Judith Zamore in her official capacity as treasurer
8 ("Brown Resp.")¹ at 1, 2 n.1, 3 (June 5, 2012) (stating that Brown understood that attendance at
9 the meeting was limited to members of OSMA and not open to the general public).

10 At OSMA's invitation, Brown and Mandel each delivered a campaign related speech to
11 OSMA's restricted class at OSMA's Annual Meeting on March 24, 2012.² Compl. ¶¶ 10-12; *see*
12 Brown Resp. at 1. According to a local news account of OSMA's Annual Meeting, in his
13 speech, Mandel repeatedly referenced Brown by name, "criticized Brown for his support of the
14 health-care law" and "accused Brown of stalling medical-malpractice reforms because of
15 Brown's close ties to lawyers." Compl. at Ex. A. After Mandel delivered his speech, Mandel's
16 campaign staff "passed out materials and collected names, phone numbers and email addresses."
17 *Id.* In contrast, Brown delivered his speech a few minutes after Mandel's, but "made no mention
18 of Mandel[.] . . . He stuck mainly to policies and initiatives he has worked on with doctors." *Id.*

19 OSMA subsequently posted links to a video recording of Brown's and Mandel's speeches
20 at the Annual Meeting on the public area of its website, along with other non-political news from

¹ Sherrod Brown did not submit a Response in his individual capacity.

² OSMA's annual meeting took place eighteen days after Ohio's primary in which Mandel won the Republican nomination to challenge Brown in the 2012 election for U.S. Senate. Compl. ¶ 8.

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OSMA's Annual Meeting. Compl. ¶ 19. The video recording included "the entire 43-minute joint-presentation" of Brown's and Mandel's speeches, without any editing by OSMA. Compl. ¶ 19. The video recording was hosted on an external site, <http://vimeo.com>.³ See *id.* at Ex. E.

The Complaint does not allege that Brown violated the Act by accepting OSMA's invitation to speak to its restricted class at its Annual Meeting. Indeed, the Complaint correctly acknowledges that the Commission's regulations permit a membership organization to invite candidates to address its restricted class. Compl. ¶ 15 (citing 11 C.F.R. § 114.3(c)(2)); see also 11 C.F.R. § 114.3(a)(2). Brown also made this point in his Response. Brown Resp. at 3 (OSMA "was squarely within its rights in inviting Senator Brown to speak and Senator Brown was squarely within his rights in accepting that invitation with no resulting contribution.") (citing 11 C.F.R. §§ 114.3, 114.4). The Complaint alleges instead that Brown knowingly accepted or received "something of value" in violation of section 441b(a) of the Act when OSMA posted to the public area of its website links to a video recording of Brown's speech to OSMA's restricted class. Compl. ¶¶ 4, 28.

While Complainant's theory of liability on this allegation is unclear, Brown in his Response interpreted the Complaint to allege that the posted video was a "coordinated communication," resulting in an in-kind contribution to the candidates under 11 C.F.R. § 109.21(b)(1). Brown Resp. at 2 n.3, 3 n.8. Brown asserts that in order for OSMA's communication beyond its restricted class to qualify as an in-kind contribution to him, the communication must satisfy the three prongs of the coordination test—payment, content, and

³ As indicated in Exhibit E to the Complaint, OSMA is a "Plus" member of Vimeo, and therefore presumably paid either a nominal monthly membership fee of \$9.95, or annual membership fee of \$59.95 to host all of the videos that OSMA posted to the web. See <http://vimeo.com/help/guidelines>; http://vimeo.com/help/faq/vimeo-plus#help/faq/vimeo_plus; <https://secure.vimeo.com/plus> (last accessed Oct. 11, 2012).

1 conduct—outlined in 11 C.F.R. § 109.21. *Id.* at 3. Brown denies that the public posting of links
2 to a recording of his speech on OSMA's website constitutes a coordinated communication, and
3 on that basis denies that he violated the Act.⁴ *Id.*

4 **B. Legal Analysis**

5 The Act and Commission regulations prohibit corporations and other organizations,
6 including membership organizations, from making contributions from their general treasury
7 funds in connection with any election of any candidate for federal office. 2 U.S.C. § 441b(a);
8 11 C.F.R. § 114.2(a). The Act also prohibits any candidate from knowingly accepting or
9 receiving any prohibited contribution. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(d).

10 A "contribution" is "any gift, subscription, loan, advance, or deposit of money or
11 anything of value made by any person for the purpose of influencing any election for Federal
12 office." 2 U.S.C. § 431(8)(A)(i). An "expenditure" is "any purchase, payment, distribution,
13 loan, advance, deposit, or gift of money or anything of value, made by any person for the
14 purpose of influencing any election for Federal Office." 2 U.S.C. § 431(9)(A)(i). "Anything of
15 value" includes all in-kind contributions and, unless specifically exempted, the provision of
16 goods and services without charge or at a charge that is less than the usual and normal charge.
17 11 C.F.R. §§ 100.52(d)(1), 100.111(e)(1).

18 Commission regulations include several exceptions permitting corporate activity that
19 would otherwise constitute an expenditure or in-kind contribution. *See* 11 C.F.R.
20 § 114.1(a)(2)(x) (excluding from the definition of "contribution" and "expenditure" any

⁴ Brown's denial on this basis is valid because the recording of Brown's speech posted via links from the public area of OSMA's website was neither an electioneering communication nor a public communication, and therefore fails the content prong of the coordinated communications test. 11 C.F.R. §§ 109.21(a), (c). Because the Commission does not dispute Brown's denial that he knowingly accepted or received an impermissible in-kind contribution from OSMA, the Commission declines to analyze further his denial under the coordinated communications test.

1 corporate, union, or membership organization activity “specifically permitted by [11 C.F.R.] part
2 114”). For example, a membership organization may invite particular candidates to address
3 members, executive and administrative personnel (or all employees), and their families at a
4 meeting, convention, or other function without making a contribution to the candidate. 11 C.F.R.
5 §§ 114.3(a)(2), (c)(2)(i).⁵ Furthermore, a membership organization may allow a candidate to
6 address all of its employees, its members, and their families at a meeting, convention, or other
7 function, without making a contribution to the candidate, provided it meets certain conditions.
8 11 C.F.R. § 114.4(e). Similarly, under certain circumstances, a membership organization may
9 sponsor an election-related appearance by a candidate before the general public without making
10 a contribution to the candidate. Advisory Op. 1996-11 at 5 (Nat’l Right to Life Conventions,
11 Inc.).

12 Although Brown’s speech was campaign related, which Brown does not contest, the
13 speech itself does not constitute a prohibited corporate contribution or expenditure because it
14 falls under the 11 C.F.R. § 114.3 exception for speeches delivered only to OSMA’s restricted
15 class. However, once OSMA made a video recording of Brown’s speech available to the public
16 beyond its restricted class, the exceptions to the definitions of “contribution” and “expenditure”
17 provided by 11 C.F.R. § 114 no longer apply. Accordingly, the costs associated with OSMA
18 making Brown’s speech available to a broader audience constitute something of value to the
19 candidate, an impermissible contribution or expenditure by OSMA in violation of 2 U.S.C.
20 § 441b. 2 U.S.C. §§ 431(8)(A)(i), 431(9)(A)(i); *see also* Advisory Op. 1996-11 at 6 (“[T]he

⁵ See also Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates, 60 Fed. Reg. 64,260, 64,267 (Dec. 14, 1995) (explanation and justification) (“Prohibited contributions include in-kind contributions resulting from the coordination of election-related corporate . . . communications with candidates, except for certain activities described in [11 C.F.R. §§ 114.3 and 114.4], which may involve limited types of coordination with candidates.”).

1 Commission cautions that an impermissible contribution would result if NRL were to distribute
2 the [candidates'] taped speeches [from NRL's convention] free of charge . . . to the general
3 public, since the taping and distribution of the candidates' views on the issues addressed at the
4 convention is something of value to the candidates.") (citing Advisory Op. 1980-90 (Atlantic
5 Richfield Company) (taping and free distribution to television stations of candidates' views on
6 energy issues is a corporate contribution)).

7 Nonetheless, there is no evidence that Brown was aware that his campaign related speech
8 would be made available to the public beyond OSMA's restricted class, and the Complainant
9 provides no evidence either from personal knowledge or otherwise to support his contention that
10 Brown knowingly accepted or received something of value. Accordingly, the Commission finds
11 no reason to believe that Sherrod Brown and Friends of Sherrod Brown and Judith Zamore in her
12 official capacity as treasurer violated 2 U.S.C. § 441b(a) by knowingly accepting or receiving an
13 impermissible in-kind contribution from OSMA.

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